who is the wife of appellant/defendant. Until the executor distributes the property the widow and the daughter merely have equitable interests. Any right or interest which the respondent/plaintiff may acquire, as a result of his adoption, will have to be determined at the proper time. To do so he will have to establish that his adoption by the widow in India is valid in this country. Further, if the adoption is valid, he will have to establish that the adoption can have retrospective effect to make him the adopted son of the deceased.

I am doubtful if the application for the appointment of a receiver can be made by an *ex parte* summons in the absence of special circumstances. The writ of summons is not one to be served outside the jurisdiction. The Kuala Lumpur address of the appellant/defendant is given. *Halsbury's* Law of England, 3rd edition, Volume 32, page 391, paragraph 627 under the heading of "Notice of Application" states:—

"After service of the writ of summons, notice should be given, if possible, to the defendant of any intended application for a receiver. A receiver is not appointed on an *ex parte* motion, either before or after appearance, in the absence of special circumstances; and *ex parte* applications for the appointment of a receiver by way of equitable execution are not granted, except in cases of special emergency. Though a defendant has not appeared, an attempt should still be made to serve him personally with notice of any motion or summons for a receiver. It is not enough to file documents in the Central Office of the High Court as in default of appearance."

No attempt was made to serve the notice on the appellant/defendant. Special circumstances have not been shown to exist. For myself I consider that the learned judge should have granted the motion to set aside his earlier order as the appellant/defendant was denied any hearing.

Appeal partly allowed.

Solicitors: *Shearn Delamore & Co.; Athi Nahappan & Co.*

LEE CHAU v. PUBLIC INSURANCE CO. LTD.

[F.C. (Ong Hock Thye C.J. (Malaya), Gill and Ali F.JJ.) July 21, 1969]

[Ipoh — Federal Court Civil Appeal No. X.25 of 1969]

Insurance — Third party claim — Settlement before judgment — Claim for reimbursement from insured on ground of breach of terms of policy — Road Traffic Ordinance, 1958, s. 80.

Road Traffic — Insurance — Duty of insurers to satisfy third party claim — Settlement before judgment — Road Traffic Ordinance, 1958, s. 80.

This was an appeal against the decision of the High Court reported *ante* p. 10.

The respondents were motor insurers. In settlement of a claim by a third party against their insured, they paid a sum of $5,500 to the third party before any judgment was obtained by the latter against their insured. The respondents brought an action against the insured for the reimbursement of the sum paid to the third party on the ground that the insured had committed a breach of the terms of the policy of insurance which would have entitled them to repudiate liability. The claim was based on the term in the policy which provided that the insured shall repay to the company all sums paid by the company which the company would not have been liable to pay but for the Road Traffic Ordinance.

Held, allowing the appeal: (1) the insurers' statutory liability towards third parties under the Road Traffic Ordinance is limited by conditions laid down in section 80, one of which is that the payment is in respect of a judgment;

(2) under the terms of the policy of insurance, the respondents' right to reimbursement did not arise unless payment was made in discharge of their statutory liability. The payment by the respondents to the third party was made before any judgment was obtained against the insured. The respondents were therefore not entitled to be reimbursed for such payment.

Cases referred to:—

(1) *Gan Chwee Leong* v. *New India Assurance Co. Ltd.* [1968] 1 M.L.J. 196.

(2) *Beacon Insurance Co. Ltd.* v. *Langdale* [1939] 4 All E.R. 204.

FEDERAL COURT.

W.S.W. Davidson for the appellant.

Peh Swee Chin for the respondents.

Ong Hock Thye C.J. (Malaya) (delivering the judgment of the court): Where motor insurers, in discharge of a compulsorily insurable liability, have settled a claim before judgment is obtained against their insured by a third party, and the insured had been in breach of a condition of the policy requiring him as soon as possible to notify the insurers of any occurrence which may give rise to a claim, is the insured bound to repay to the insurers any sum so paid to the third party?

This question was answered in the affirmative by the High Court at Ipoh, allowing a claim by the respondents for $5,500 and costs. The judgment was reversed by us on appeal and we now give the grounds of our decision.

Purporting to follow *Gan Chwee Leong* v. *New India Assurance Co. Ltd.*[1] the learned trial judge held that, the law being clear as to the insurers' right to take over the proceedings or negotiations from the insured, the insurers were entitled, in the common interest of themselves and their insured, to pay off the third party whose claim they reasonably considered incontestable. Since he found as a fact that the appellant had failed within a reasonable time to give notice of the accident to the respondents and was thereby in breach of a condition of the policy, it appeared to him that "the

right to claim reimbursement was preserved by contract between the insured and insurers" and accordingly the respondents must succeed.

With all respect we are unable to agree. Insofar as *Gan Chwee Leong* appears to lay down the principle that, because "the liability of the (insured) was complete as soon as the accident happened", the insurers "were within their rights in effecting a settlement in the common interest of themselves and the insured", we do not think the decision was justified by authority. It was said that the facts in *Beacon Insurance Co. Ltd.* v. *Langdale* [2] were indistinguishable from *Gan Chwee Leong's* case. The truth is that the causes of action were totally different. In the English case the insured had expressly agreed to be liable himself for the first £5 of any claim and the insurers, having settled with a third party claimant by paying him £45, were merely seeking enforcement of the insured's contractual obligation. They were not claiming a right to reimbursement which they were at liberty to reserve to themselves by virtue of the proviso to section 38 of the Road Traffic Act, 1930. That section is reproduced in section 78 of our Road Traffic Ordinance. For greater ease of reference we quote section 38 of the Act:—

"38. Any condition in a policy or security issued or given for the purposes of this Part of this Act, providing that no liability shall arise under the policy or security or that any liability so arising shall cease, in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy or security, shall be of no effect in connection with such claims as are mentioned in paragraph (b) of subsection (1) of section thirty-six:

Provided that nothing in this section shall be taken to render void any provision in a policy or security requiring the person insured or secured to repay to the insurer or the giver of the security any sums which the latter may have become liable to pay under the policy or security and which have been applied to the satisfaction of the claims of third parties."

In *Gan Chwee Leong*,[1] on the other hand, the insurers' claim appeared to have been based on the proviso to section 78 of our Ordinance, to which the defence pleaded was that the payment to the third party being a voluntary payment — not under a judgment — the insured was not legally obliged to repay. The decision there, however, turned on the fact that the insurers, by not producing the policy in evidence, had failed to prove their contractual right to reimbursement. With respect we think the decision was right on this particular ground. The terms of the policy pleaded were sufficient only for the purpose of proving a breach of condition by the insured as to reporting the accident. Once it was held that there was a breach, the provisions of section 78 must come into force so as to preserve the third party claim against the insurers, but in order to entitle the insurers to recover payment from their insured the contractual obligation to repay had to be proved, since there was no admission thereof in the pleading.

For the above reasons we held that, in the instant case, the decision was arrived at on wrong principles. Here the contractual right of the respondents to be reimbursed was expressed in the policy which was in evidence. The relevant stipulation reads as follows:—

"AVOIDANCE OF CERTAIN TERMS AND RIGHT OF RECOVERY.

Nothing in this policy or any endorsement hereon shall affect the right of any person entitled to indemnity under this policy or of any other person to recover an amount under or by virtue of the Legislation.

But the insured shall repay to the company all sums paid by the company which the company would not have been liable to pay but for the Legislation."

The insurers' statutory liability towards third parties, however, is limited by certain conditions and qualifications laid down in section 80, of which it is necessary to quote only the first two sub-sections, *viz.*:—

"80 (1) If, after a certificate of insurance has been delivered under sub-section (4) of section 75 of this Ordinance to the person by whom a policy has been effected, *judgment* in respect of any such liability as is required to be covered by a policy under paragraph (b) of sub-section (1) of section 75 of this Ordinance (being a liability covered by the terms of the policy) *is given against any person insured by the policy*, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgments.

(2) No sum shall be payable by an insurer under the foregoing provisions of this section —

(a) *in respect of any judgment*, unless before or within seven days after the commencement of the proceedings in which the judgment was given the insurer had notice of the proceedings; or

(b) *in respect of any judgment*, so long as execution thereon is stayed pending as appeal;".

In our opinion the law on the point is perfectly clear: the contractual right to reimbursement itself is based on section 80 and this section, imposing a *statutory liability* on the respondents as insurers, must be construed strictly. Insurers are liable to satisfy a third party claim only if there is a judgment, but not otherwise: (see *Halsbury*, 3rd Ed., Vol. 22, paragraph 769). Payment by simple agreement between the third party and the insurers is not payment "in respect of any judgment" and that is all there is to it.

The appeal was accordingly allowed with costs.

Appeal allowed.

Solicitors: *Gibb & Co.; Peh Swee Chin.*